SUPREME COURT, U.S.

FILED

APR 11 1972

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1164

EARL L. WATTS,

Petitioner in Certiorari

vs.

ETHEL GRADY MYLIUS,

Defendant in Certiorari

INDEX TO PETITION OF EARL L. WATTS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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PETITION OF EARL L. WATTS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Earl L. Watts files this his petition for Writ of Certiorari to the Court of Appeals of Georgia, for the purpose of having reviewed, corrected, and reversed, the

decision and judgment of that Court of September 9, 1971 affirming the order of Judge Jack B. Smith of the State Court of DeKalb County, Georgia of April 7, 1971 denying the motion of your petitioner as amended for a new trial in the case of Ethel Grady Mylius vs. Earl L. Watts in the latter Court for alleged fraud and deceit, in which a judgment was rendered by said Judge Smith against Watts on December 22, 1970 for $10,000.00 principal, plus interest from August 25, 1970 in the sum of $233.33, and attorney fees in the sum of $3,000.00, in the enforced absence of Watts due to his serious illness as shown by the affidavit of his attending physician, Dr. W. Harrison Reeves, and despite the motion of E. B. Shaw as attorney for Watts for a continuance on said ground, and over his strenuous objections.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The decision of the Court of Appeals of Georgia sought to be reviewed was rendered by that Court on September 9, 1971 and is reported in *Watts vs. Mylius, 124 Ga. App. 475*, a copy of which is attached as Petitioner's Exhibit A. Petitioner filed a motion for a rehearing in that Court on September 15, 1971 and it was denied on September 29, 1971. He filed a petition with the Supreme Court of Georgia on October 19, 1971 for a writ of certiorari to the Court of Appeals and it was denied on November 8, 1971. He filed a motion for reconsideration of the denial of his petition for certiorari on November 17, 1971 and it was denied on December 1, 1971.

The Court of Appeals of Georgia is, therefore, the highest Court of this State in which a decision in this case could be had.

Petitioner contends that the decision of the Court of Appeals of Georgia in upholding Judge Jack B. Smith of the Trial Court in overruling petitioner's motion for a continuance, by reason of his serious illness making it impossible for him to attend court, in rendering the above stated judgment against him in his absence and

without any competent or legal evidence whatever to support it, and in overruling his motion for a new trial, unless reversed by this Court, will deprive petitioner of his property to the extent of the amount of said judgment of Judge Smith of August 25, 1970 and other substantial damages resulting therefrom by depriving him of Due Process of Law and of Equal Protection of the Law granted to other persons in like circumstances and similar situations, in violation of Section I of Amendment XIV of the U. S. Constitution.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Section 1257 (3) of Title 28, U. S. Code, reading in part as follows: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: ***(3) By writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the Constitution *** of *** the United States."

QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the Court of Appeals of Georgia of September 9, 1971, unless reversed by this Court, will deprive petitioner, a citizen of Georgia and of the United States, of his property to the extent of the amount of the judgment rendered against him by Judge Jack B. Smith of the State Court of DeKalb County, Georgia on December 22, 1970 and other substantial damages resulting therefrom, by depriving him of Due Process of Law and of Equal Protection of the Law granted to other persons in like circumstances and similar situations, in violation of Section I of Amendment XIV of the United States Constitution in the following particulars:

1. In upholding Judge Jack B. Smith in arbitrarily and capriciously denying, in violation of Georgia Code Section 81-1412 and Section I of Amendment XIV of the U. S. Constitution, the motion of petitioner's counsel for a continuance on the ground that petitioner was seriously ill and unable to attend court for that reason as shown

by the affidavit of his attending physician, Dr. W. Harrison Reeves, submitted to Judge Smith by petitioner's counsel, a copy of which is attached hereto as Exhibit B.

2. In upholding Judge Jack B. Smith in arbitrarily and capriciously denying, in violation of Section I of Amendment XIV of the U. S. Constitution, the motion of petitioner's counsel for a judgment in his favor on the pleadings on the ground that they showed without any genuine issue as to any material fact that he was entitled to said judgment.

3. In upholding Judge Jack B. Smith in arbitrarily and capriciously rendering, in violation of Section 1 of Amendment XIV of the U. S. Constitution, the judgment against your petitioner for $10,000.00 plus interest from August 25, 1970 in the sum of $233.33 and attorney fees in the sum of $3,000.00 when there was no competent or legal evidence whatever to support said judgment.

4. In upholding Judge Jack B. Smith in arbitrarily and capriciously refusing to hold, in violation of Section I of Amendment XIV of the U. S. Constitution, that the contract between Ethel Grady Mylius and Earl L. Watts of August 25, 1970, a copy of which was attached to the suit of the former against the latter and is also attached to this petition as a part of Exhibit C, demanded a judgment against the said Ethel Grady Mylius and for your petitioner.

5. In upholding Judge Jack B. Smith in arbitrarily and capriciously refusing to hold, in violation of Section I of Amendment XIV of the U. S. Constitution, that the petition of Ethel Grady Mylius as amended did not show or set forth any cause of action against Earl L. Watts.

6. In upholding Judge Jack B. Smith in arbitrarily and capriciously denying, in violation of Section I of Amendment XIV of the U. S. Constitution, the motion of E. B. Shaw as attorney for Watts to strike the amendment of Ethel Grady Mylius to her petition on the ground that it contained immaterial and impertinent matter prejudicial to your petitioner.

7. In upholding Judge Jack B. Smith in arbitrarily and capriciously denying, in violation of Section I of Amendment XIV of the U. S. Constitution, the motion of E. B. Shaw as attorney for Watts to strike paragraphs 5, 6, and 7 of the amendment of Mrs. Mylius to her petition containing immaterial and impertinent matter of a prejudicial nature to your petitioner.

8. In holding that the affidavit of Dr. W. Harrison Reeves that your petitioner was seriously ill and unable to attend any kind of court hearing or trial was "not properly entitled in the cause, and was not admissible in evidence," and that "For this reason alone the court did not abuse its discretion in refusing the continuance regardless of the other reasons for denying the same, in violation of Georgia Code Section 81-1412 and Section I of Amendment XIV of the U. S. Constitution.

9. In holding, in violation of Section I of Amendment XIV of the U. S. Constitution that, "The appellant having failed to properly argue the various grounds of his complaint according to the rules of this court, the same cannot be considered."

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

In this statement Ethel Grady Mylius will be referred to as the plaintiff and Earl L. Watts as the defendant.

The plaintiff filed a complaint in the State Court of DeKalb County, Georgia against the defendant under No. A-89125 on October 19, 1970, alleging in substance that defendant had injured and damaged her in the sum of $10,000.00 principal, interest at the legal rate from August 25, 1970, $25,000.00 in punitive damages, and $5,000.00 in attorney fees, by misrepresentation in inducing plaintiff to purchase an alleged 5% interest in an option to purchase the Candler Hotel located in Decatur, DeKalb County, Georgia. Plaintiff attached to her complaint as her Exhibit A a copy of the agreement which she and the defendant signed. A copy of said complaint and agreement is attached as Exhibit C.

Defendant filed his answer and defense, a copy of which is attached as Exhibit D, denying that he had, by misrepresentation, induced plaintiff to purchase an alleged 5% interest in an option to purchase said Candler Hotel, but alleging that the plaintiff had freely and voluntarily made the investment in the option to purchase the Candler Hotel as shown in her said Exhibit A; that the defendant was ready, willing, and able to comply with the terms of said agreement; and the defendant denied the allegations in paragraphs 6 through 15 of said complaint, with the exception of paragraph 13, which alleged "That the plaintiff had made demand on defendant for return of said $10,000.00 and defendant has failed and refused to return the same."

Plaintiff amended her complaint by adding Count II, a copy of which is attached as Exhibit E, alleging in substance that "said agreement or contract is a security as defined by the Georgia Securities Act: That defendant has not complied with the Georgia Securities Act in registration of said agreement as by law provided;" and that plaintiff elected to void said agreement and tendered it to defendant for the return of $10,000.00 together with interest from August 25, 1970, "plus reasonable attorney fees in the sum of *** $5,000.00." She also sought $25,000.00 punitive damages in said amendment.

Paragraph (6) of said agreement, attached to plaintiff's complaint as her Exhibit A specifically stated: "Party of the Second Part (Ethel Grady Mylius) has read this agreement before signing same, and does hereby enter into said agreement freely and voluntarily and without any undue influence being used in any way to influence party of the second part to enter this agreement."

Defendant filed a motion for judgment in his favor on the pleadings on the ground that they showed without any genuine issue as to any material fact that he was entitled to said judgment; to dismiss plaintiff's petition because it did not set forth any cause of action against defendant; to strike the amendment of plaintiff because it contained immaterial and impertinent matter; to strike paragraph 5 of plaintiff's amendment alleging "That said

agreement or contract is a security as defined by the Georgia Securities Act," on the ground it was a mere conclusion without any allegations of fact or principles of law to support it; to strike paragraph 6 alleging "That defendant has not complied with the Georgia Securities Act in registration of said Agreement as by law provided," on the ground that said allegation was a mere conclusion without any allegations of fact or principles of law to support it, and that said agreement was not required to be registered under the law; to strike paragraph 7 on the following grounds: That plaintiff had no authority under the law to "void said agreement;" that it is binding upon both plaintiff and defendant; that said paragraph consists of conclusions and arguments of inflammatory and highly prejudicial nature to defendant without any allegations of fact or principles of law to support them; and that the plaintiff was not entitled under the pleadings and the applicable law to any sums sought by her in said paragraph. A copy of said Motion of Defendant to Strike is attached as Exhibit F .

When the case was called for trial by Chief Judge Oscar Mitchell of the State Court of DeKalb County, E. B. Shaw as attorney for Earl L. Watts moved for a continuance on the ground that the latter was seriously ill and unable to attend court and submitted affidavit from Dr. W. Harrison Reeves, a copy of which is attached as Exhibit B , supporting said motion. Judge Mitchell refused to grant said continuance and sent the case to Judge Jack B. Smith of said Court.

Mr. Shaw submitted said affidavit of Dr. Reeves to Judge Smith and filed with him as his Exhibit 2 and read the following motion: "I move for a continuance on the ground that my client is not able to attend court and will not be able to attend court for approximately seventy-five (75) days as shown by the affidavit of his physician, which I am submitting to you. I am not in a position to try this case without my client or when he is physically unable to be present and cooperate with me in the trial of it. If said motion is refused for continuance, I respectfully note an exception thereto upon the following grounds: (a) It would deprive the defendant of his

property without Due Process of Law and without Equal Protection of the Law and in violation of Article I, Section I, Paragraphs I, II, III, IV, V, and XXIII of the Georgia Constitution and Amendments V, IX, and X of the U. S. Constitution as applied to the states by Section I of Amendment XIV thereof. I respectfully call your Honor's attention to the following cases: Gideon vs. Wainwright, 372 U.S. 335, and Ferguson vs. State of Georgia, 365 U.S. 570."

Judge Smith overruled said motion by stating as follows: "I am going to go ahead and declare this case on trial and, of course, if we get to such particular point where The Court feels that his rights are being jeopardized or if he has reason to order a continuance, I can always declare a mistrial and put it over to some date in the future. I am going to let the case proceed."

Judge Smith then proceeded to try the case in the absence of Earl L. Watts, over the strenuous objections and exceptions of E. B. Shaw as his attorney, and he never did change his ruling.

Mr. Shaw then urged his aforesaid written motion for a judgment on the pleadings in favor of Mr. Watts on the ground that they showed without any genuine issue as to any material fact that he was entitled to said judgment, and to strike the complaint of plaintiff as amended, etc. This motion was denied by Judge Smith.

Judge Smith allowed counsel for the plaintiff to present several witnesses, including the plaintiff herself, in the absence of the defendant, over the strenuous objections of defendant's counsel, and then entered a judgment against Defendant Watts for $10,000.00 plus interest from August 25, 1970 (the date of the contract between the parties) in the sum of $233.33 and attorney fees in the sum of $3,000.00.

No competent or legal evidence whatever was presented, however, supporting or authorizing said judgment but, on the contrary, a judgment for Defendant Watts on the pleadings as moved by his counsel was demanded, especially in the light of the contract between the parties.

of which a copy was attached by Plaintiff Mylius to her complaint.

Defendant Watts filed a skeleton motion for new trial on December 22, 1970 and an amendment thereto on March 24, 1971 and said motion as amended was denied by Judge Smith on April 7, 1971.

He appealed to the Court of Appeals of Georgia on April 9, 1971 on the grounds urged before Judge Smith, and specifically urged "that the court erred in refusing to grant defendant's motion for a continuance, and had the effect of depriving defendant of his property without due process of law and without equal protection of the law and in violation of Article I, Section I, Paragraphs I, II, III, IV, V and XXIII of the Georgia Constitution and Amendments V, IX, and X of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof."

He cited *Hovey vs. Elliott, 167 U.S. 409, 17, S. Ct. 841,* and *Gideon vs. Wainwright, 372 U.S. 335,* and *Ferguson vs. Georgia, 365 U.S. 570,* in support of said State and Federal constitutional ground.

He also contended in the Court of Appeals that he was deprived of Due Process of Law and of Equal Protection of the law in violation of Section I of Amendment XIV of the U.. S. Constitution on the other grounds urged before the trial court in his enumerations of error in the Court of Appeals.

The Court of Appeals affirmed the trial court on September 9, 1971 in *Watts v. Mylius, 124 Ga. App. 475,* a copy of which decision is attached as Exhibit A.

Petitioner filed a motion for rehearing in the Court of Appeals on Sept. 15, 1971 and again urged the same State and Federal constitutional grounds. Denied on Sept. 29, 1971.

Petitioner filed a petition with the Supreme Court of Georgia on October 19, 1971 for a writ of certiorari to the Court of Appeals of Georgia to review, correct, and reverse the decision of the latter, and urged the same State and Federal Constitutional grounds he urged before the Trial Judge and the Court of Appeals of Georgia. Denied Nov. 8, 1971.

Petitioner filed a motion for reconsideration on November 17, 1971 and urged the same State and Federal Constitutional grounds which he urged in his said petition for certiorari. It was denied on December 1, 1971.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

The questions involved in this petition for certiorari are substantial and of gravity and importance in that the decision and judgment of the Court of Appeals of Georgia of September 9, 1971 in *Watts vs. Mylius, 124 Ga. App. 475*, unless reversed by this Court, will deprive petitioner, a citizen of Georgia and of the United States, of his property to the extent of the judgment rendered against him by Judge Jack B. Smith and other substantial damages resulting therefrom, without Due Process of Law and without Equal Protection of the Law in depriving him of his Day in Court by trying his case in his absence due to his serious illness and in utter disregard of the Motion of his Counsel for a Continuance on said ground based upon the Affidavit of his Attending Physician, Dr. W. Harrison Reeves, that he had "Diabetes Mellitus with visual disturbance (neuropathy);" that he was in urgent need of Immediate Medical Treatment and possible Hospitalization; that he was "not in condition to take part in any kind of court trial or hearing; "and that to subject him to such "would be extremely Dangerous to him and could be Fatal."

As pointed out by the Supreme Court of Georgia in *Central of Ga. Ry. Co. vs. Yesbik, 146 Ga. 620, 91 S.E. 873*, this Court has granted the writ of certiorari where "the case involved questions of great public concern or matters of gravity and importance (Lau Ow Bew, 141 U.S. 583, 12 S.Ct. 43)," and "where the decision would seriously affect the administration of justice (Re Chetwood, 165 U.S. 443, 17 S.Ct. 385) and in similar instances." CERTAINLY THIS PETITION SHOWS THAT THIS CASE QUALIFIES IN ALL OF SAID RESPECTS.

Mr. Shaw as attorney for Mr. Watts in the Court of Appeals and Supreme Court of Georgia very aptly cited,

relied upon, and quoted as follows from *Hovey vs. Elliott, 167 U.S. 409, 17 S.Ct. 841,* in appealing from the unconstitutional and unconscionable judgment of Judge Jack B. Smith:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends***. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.**"

Mr. Shaw also cited and relied upon *Gideon v. Wainwright, 372 U.S. 335,* and *Ferguson v. State of Georgia, 365 U.S. 570,* in this case in the State Trial and Appellate Courts. As he pointed out, the presence and participation in the trial of a case by the client is just as essential, if not more so, than that of his counsel.

As pointed out by Mr. Shaw in his petition in the Supreme Court of Georgia for a Writ of Certiorari to the Court of Appeals of Georgia, the cases cited and relied upon by the latter in support of paragraph 2 of its decision that Dr. Reeves' affidavit "was not admissible in evidence" because "it is not properly entitled in the cause," do not do so.

In the case of *Parks vs. State, 110 Ga. 760, 38 S.E. 79,* cited and relied upon by the Court of Appeals, the affidavit involved was "filed for the purpose of bringing a case to this Court In Forma Pauperis." It necessarily had to be entitled in the cause in order to show that the affiant was unable by reason of his poverty to pay the costs in THAT case. The Affiant was a party to the cause seeking to appeal in his case In Forma Pauperis. In this case Dr. Reeves was not a party and it was not necessary that his affidavit be "entitled in the cause" because it

stated that Mr. Watts, the party in question, was physically unable to appear in court for ANY trial or hearing. If he could not do so, he certainly could not appear in the trial of THIS case. Furthermore, he stated in his affidavit that Mr. Watts could not appear in ANY court for any trial or hearing for 75 days from its date, which was about five days before the date of the trial.

In the case of *Brucker v. O'Connor, 115 Ga. 95, 41 S.E. 245*, the person who made the affidavit in question was a party seeking to appeal his case In Forma Pauperis and it was also necessary for it to be entitled in that case to show that he was unable by reason of his poverty to pay the costs in THAT case.

The case of *Horton et al v. Fulton et al, 130 Ga. 466 (3), 60 S.E. 1059*, cited and relied upon by the Court of Appeals, involved an interlocutory hearing for injunction, as well as the case of Warren et al v. Monnish, 97 Ga. 399, cited in the former case, and it can therefore be readily seen that it was necessary for affidavits presented as evidence in those cases to be entitled in said causes to show that they were related thereto.

None of said cases cited by the Court of Appeals has any application to this case for the reasons stated.

Mr. Watt's attorney prepared the affidavit of Dr. Reeves upon information furnished by him for use in this case and presented it to the Trial Judge for that purpose. No evidence whatever was presented contrary to said affidavit. If any evidence to the contrary had been presented, counsel for Mr. Watts would have been entitled to time and opportunity to present Dr. Reeves in person for direct and cross-examination. Counsel for the opposite party could have also had Mr. Watts examined by another physician if he had so desired and requested.

In this connection, attention is invited to the case of *Kelly vs. Strouss et al, 116 Ga. 872, 43 S.E. 280*, holding in part:

> "Whenever the Judge sees that a party is about to prevail who in law is not entitled to prevail, that the law is about to be violated, that a grave injustice is

about to be done under the forms of law, IT IS NOT ONLY THE RIGHT, BUT THE DUTY OF THE COURT OF HIS OWN MOTION TO INTERPOSE AND GIVE THE CASE SUCH DIRECTION AS WILL PREVENT A RESULT WHICH WOULD BE INCONSISTENT WITH THE LAW. While it is the duty of counsel to protect the client from wrong and injustice, IT IS MUCH MORE THE DUTY OF THE JUDGE TO SAVE THE LAW FROM BEING OUTRAGED. NEITHER THE LACHES OF THE LITIGANT NOR THE NEGLIGENCE OF COUNSEL WILL ABSOLVE THE JUDGE FROM HIS SWORN OBLIGATION TO ADMINISTER THE LAW.***"

Attention is also invited to the case of *Houston White vs. The State, 218 Ga. 290, 127 S.E. 2nd 668*, holding in substance that the trial judge in that case committed "GROSS ABUSE OF DISCRETION" in adjudging Mr. White in contempt of court for the argument he made while sick in support of his motion for a continuance of his case by reason of his illness. In the body of the decision the Supreme Court of Georgia stated in part:

"But the immutable fact is that on April 15, shortly BEFORE the occurrence of the events of specifications 2 and 3, his condition was established and recognized to be that of a lawyer too ill to discharge his professional duties. It is apparent that his illness had an adverse effect upon his patience, tolerance, poise, and self control while he engaged in three days of a hard fought child custody trial. The judge, clearly and repeatedly recognizing Mr. White's illness, excused him from the further trial of that case until he recovered.

"We hold that this man, under these facts, was not subject to the normal standards of conduct and, therefore, should not have been adjudged in contempt.

* * * *

"The judgment of the Court of Appeals is reversed."

CERTAINLY MR. WATTS IN HIS SERIOUSLY ILL CONDITION AS DESCRIBED IN THE AFFIDAVIT OF DR. REEVES WAS IN NO CONDITION TO TRY OR

TESTIFY IN HIS CASE EVEN IF HE COULD HAVE BEEN BROUGHT TO COURT IN SUCH SERIOUS CONDITION.

Mr. Shaw submitted to the Court of Appeals the following authorities in support of the appeal of Mr. Watts:

Ga. Code Section 81-1412 providing: "If either party shall be providentially prevented from attending at the trial of any cause, and the counsel of such absent party will state in his place that he cannot go safely to trial without the presence of such absent party, such cause shall be CONTINUED, provided his continuances are not exhausted." This case had never been continued before.

Morse vs. Lowe, 111 Ga. 274, 36 S.E. 688, holding: "Where, upon a motion for a continuance made in behalf of a claimant, it appeared that the claimant was providentially prevented from attending the trial, and the claimant's counsel stated, in his place, that he could not go safely to trial without the presence of his client, and NO COUNTER SHOWING WAS MADE, IT WAS ERRONEOUS TO OVERRULE THE MOTION, although the entry, 'Continued for sickness of claimant's family,' had been made upon the docket at a previous term."

Connell and Long v. Sharpe, 32 Ga. 443, holding: "1. Upon a motion for a continuance, it appeared that the party was in bed sick, and therefore unable to be present at the trial. His attorney also stated that he could not go to trial safely without the presence and aid of his client: HELD, that the continuance should have been allowed."

Martin vs. Nichols et al and vice versa, 121 Ga. 506, 49 S.E. 613, holding: "3. It is error to refuse a first continuance when it is shown that the party is ill, and his counsel states in his place that he cannot safely go to trial without the presence of his client."

Odom v. Odom, 209 Ga. 451, 74 S.E.2nd 1, holding: "The motion to set aside in the instant case is based upon the sole ground that the trial judge erroneously denied a motion, which was based upon the illness of the defendant, to continue the case when it was called for

trial. Such a motion to continue must be supported by an affidavit of the attending physician, or like evidence, and must state that the condition of the party is such as to PREVENT HIS ATTENDANCE IN COURT." IT DOES NOT STATE THAT IT HAS TO BE ENTITLED IN THE CAUSE AS HELD BY THE COURT OF APPEALS IN THE CASE AT BAR. CERTAINLY THE AFFIDAVIT OF DR. REEVES IN THIS CASE MET THE ABOVE STATED REQUIREMENTS.

Moore vs. Moore, 211 Ga. 233, 85 S.E. 2nd 12, reversing judgment rendered against a person having a good defense who was providentially prevented from attending court because of illness and who had no means of communicating with her counsel or the court.

In Plaintiff's original complaint she contends that the defendant "by misrepresentation induced plaintiff to purchase an alleged 5% interest in an option to purchase the Candler Hotel *** by entering into an agreement with defendant, a copy of said agreement being attached hereto as Exhibit A and made a part hereof by reference thereto." Reference to said contract; however, will show that it is valid, legal, and unambiguous and specifically states: "(6) Party of the Second Part has read this agreement before signing same, and does hereby enter into said agreement before signing same, and does hereby enter into said agreement FREELY AND VOLUNTARILY, AND WITHOUT ANY UNDUE INFLUENCE BEING USED IN ANY WAY TO INFLUENCE PARTY OF THE SECOND PART TO ENTER THIS AGREEMENT."

The contract clearly states "That party of the First Part is the holder of an option to purchase the property known as Candler Hotel *** dated February 2nd, 1970, and said option terminates on February 2nd, 1971," and "That party of the Second Part desires to purchase a five (5%) per cent interest in said option, which shall at the time of the closing of the purchase of said Candler Hotel, entitle Party of the Second Part a five (5%) per cent interest in said property *** located at 150 East Ponce de Leon Avenue, Decatur, DeKalb County, Georgia."

The contract provides that upon the payment of $10,000.00 by the second party to the first party at the time of entering the contract and $15,000.00 on or before February 25th, 1971, the second party would receive a five per cent interest in said option and upon the purchase of the property a five per cent interest therein and in the net profits of the business of a Personal Care Home to be operated on said property. It provided that the second party would assist and cooperate with party of the first part in obtaining a loan for the purchase of said Candler Hotel property and that a part of the $25,000.00 paid by second party to the first party would be used for the expenses of appraisal and loan costs in obtaining the purchase of said property.

The Second Party paid the $10,000.00 to the First Party on the date the contract was signed but never paid the balance of $15,000.00 she agreed to pay or any part thereof and did not assist and cooperate with party of the First Part in any manner in obtaining a loan for the purchase of the property as she agreed to do. The First Party, however, secured a loan for the purchase of said property for the price of $350,000.00 agreed upon in the option and consummated said sale and is now operating a Personal Care Home on said property in the name of Candler Manor, Inc.

Your petitioner has not deceived or defrauded Second Party Mylius in any manner whatever but has complied with said contract in letter and spirit while she has failed and refused to do so and has thereby caused your petitioner much expense, damage, embarrassment, annoyance and inconvenience.

In this connection, attention is invited to the following authorities:

Woods et al vs. Noland Credit Co., 113 Ga. App. 749 (1), 149 S.E.2nd 720, holding: "To amount to fraud, a misrepresentation must relate to past or existing facts and cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events.

Ordinarily promises to perform some act in the future will not amount to fraud in legal acceptation."

Swofford vs. First National Bldg. and Loan Association, 184 Ga. 312, 191 S.E. 103, holding that "One having the capacity and opportunity to read a written contract, and who signs it, not under any emergency and whose signature is not obtained by any trick or artifice of the other party, cannot afterwards set up fraud in the procurement of his signature to the instrument. Truitt-Silvey Hat Co. vs. Callaway & Truitt, 130 Ga. 637(2), 61 S.E.481. That the maker of a plain and unambiguous written contract with a corporation was induced to execute the same by false and fraudulent representations as to its methods of doing business and as to the probable results of the transaction evidenced by such contract, is not a valid defense to an action thereon, when there is nothing to show that the maker was misled or deceived as to its contents, or in any manner prevented from ascertaining the same. Angier v. Equitable Bldg. & Loan Asso., 109 Ga. 625(3), 35 S.E.64***."

Morrison et al vs. Roberts, 195 Ga. 45, 23 S.E.2nd 164, holding: "1. Where one who can read signs a contract without apprising himself of its contents, otherwise than by accepting representations made by the opposite party, with whom there exists no fiduciary or confidential relation, he cannot defend an action based on it, or have it canceled or reformed; on the ground that it does not contain the contract actually made, unless it should appear that at the time he signed it some such emergency existed as would excuse his failure to read it, or that his failure to read it was brought about by some misleading artifice or device perpetrated by the opposite party, amounting to actual fraud such as would reasonably prevent him from reading it.***"

Hancock v. Gunter, 195 Ga. 646, 24 S.E.2nd 772, holding: "In Dortic v. Dugas, 55 Ga. 484(6), it was said: 'With equal opportunities for knowing the truth, a party grossly failing to inform himself must take the consequence of his neglect.'"

The Court of Appeals, after affirming in paragraph 2 of its decision the trial court in denying Appellant Watts' Motion for a continuance due to his illness, stated, "The appellant having failed to properly argue the various grounds of his complaint according to the rules of this court the same cannot be considered."

Mr. E. B. Shaw as attorney for Appellant Watts vigorously urged before the Court of Appeals in his written Brief and also in his Motion for a Rehearing and orally in person that the trial court committed reversible error in denying his motion for a judgment on the pleadings in favor of Appellant Watts on the ground that they showed without any genuine issue as to any material fact that the defendant was entitled to said judgment in his favor and that plaintiff's complaint did not state a claim upon which relief could be granted. He cited Ga. Code Section 81A-112 (h) (2) in support thereof. It provides: "A defense of failure to state a claim upon which relief can be granted *** may be made in any pleading permitted or ordered under section 81A-107(a), or by motion for judgment on the pleadings, or at the trial on the merits."

He also urged in his Brief and Motion for Rehearing and in his oral argument before the Court of Appeals his motion to strike the complaint of Plaintiff Mylius as amended on the ground that it contained immaterial and impertinent matter.

The written motion of Appellant for a judgment in his favor on the pleadings and to strike the complaint of Plaintiff Mylius as amended also appeared on pages 17 and 18 of the record in this case in the Court of Appeals. The entire record and transcript of the evidence and proceedings in the trial court in this case were in the Court of Appeals for consideration with the appeal of Appellant.

CONCLUSION

Petitioner contends that the foregoing petition shows beyond question that he will be deprived of his property

in the manner and particulars specified, by the Court of Appeals of Georgia in affirming the trial court, without Due Process of Law and Without Equal Protection of the law in violation of Section I of Amendment XIV of the U. S. Constitution, unless this Honorable Court grants the writ of certiorari to the Court of Appeals of Georgia and reverses its unconstitutional decision and judgment.

As held by this Court in *State of Missouri ex rel Gaines vs. Canada et al, 305 U.S. 357 (7), 59 S. Ct. 232, 356*, Equal Protection of the Law is a pledge of the protection of equal laws.

As also held by this Court in *Hill vs. State of Texas, 316 U.S. 400, 62 S.Ct. 1159*, Equal Protection of the Law is something more than an abstract right. It is a command which the State must respect, the benefit of which every person may demand.

The judgment of the Trial Court as affirmed by the Court of Appeals of Georgia in *Watts vs. Mylius, 124 Ga. App. 475*, is "Not only against evidence, but so flagrantly unjust as to shock the moral sense," and in accordance with the decision of the Supreme Court of Georgia in *Swindle vs. Poore, 59 Ga. 337*, as applied to other persons in like circumstances and similar situations, demanded the grant of Defendant Watts' motion for new trial and reversal of the Court of Appeals in affirming the denial by the Trial Court of said Motion.

To paraphrase the language of the U. S. Supreme Court in *Hazel-Atlas Glass Co. vs. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997*, "where the occasion has demanded, where the enforcement of the judgment is 'MANIFESTLY UNCONSCIONABLE,'" this court has "wielded the power without hesitation" to give relief from it. In that case this court stated in part:

"THIS MATTER DOES NOT CONCERN ONLY PRIVATE PARTIES. THERE ARE ISSUES OF GREAT MOMENT TO THE PUBLIC. ***"

With reference to the trial of the case of Defendant Watts in the State Court of DeKalb County in his absence due to his serious illness, attention is invited to the case of *Greene vs. McElroy et al, 360 U.S.474, 79 S.Ct. 1400*, holding that the requirements of CONFRONTATION AND CROSS-EXAMINATION ARE ESSENTIAL TO DUE PROCESS in both CIVIL and Criminal cases as well as ADMINISTRATIVE AND REGULATORY ACTIONS, and that they find expression in the Sixth Amendment to the U. S. Constitution, which provides that in all criminal cases the accused shall enjoy the right "TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM."

This Court further held in that case: "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of Documentary evidence, IT IS EVEN MORE IMPORTANT WHERE THE EVIDENCE CONSISTS OF THE TESTIMONY OF INDIVIDUALS WHOSE MEMORY MIGHT BE FAULTY OR WHO, IN FACT, MIGHT BE PERJURERS OR PERSONS MOTIVATED BY MALICE, VINDICTIVENESS, INTOLERANCE, PREJUDICE, OR JEALOUSY. WE HAVE FORMALIZED THESE PROTECTIONS IN THE REQUIREMENTS OF CONFRONTATION AND CROSS-EXAMINATION."

"Now the God of Peace, that brought again from the dead our Lord Jesus, that great shepherd of the sheep, through the blood of the everlasting covenant, make you perfect in every good work to do His will, working in you that which is wellpleasing in His sight, through Jesus Christ; to whom be glory for ever and ever. Amen." (Heb. 13:20-21).

WHEREFORE, Petitioner earnestly and urgently appeals to this Honorable Court to grant a Writ of Certiorari to the Court of Appeals of Georgia to review, correct, and reverse its decision and judgment of September 9, 1971 in this case.

Respectfully submitted,

G. SEALS AIKEN,
Attorney for Petitioner
Suite 1626 Candler Bldg.,
Atlanta, Georgia 30303

E. B. SHAW,
Of Counsel for Petitioner
116 Pryor St., S.W.,
Atlanta, Georgia 30303

PETITIONER'S EXHIBIT A

EARL L. WATTS, APPELLANT VS. ETHEL GRADY MYLIUS, APPELLEE, 124 Georgia Appeals 475.

EVANS, Judge. Ethel G. Mylius sued E. L. Watts for damages, including punitive damages and attorneys fees, arising out of fraud and deceit allegedly practiced upon her by the defendant. The defendant denied the material portions of the complaint. On the call of the case the defendant was absent and his counsel moved for a continuance, submitting the affidavit of a doctor as to his urgent need of immediate medical treatment and possible hospitalization, stating therein that the defendant was not in condition to take part in any kind of trial or hearing. The trial court denied the motion and after a trial without the intervention of a jury, rendered judgment

against the defendant. A motion for new trial was filed and thereafter amended, adding six special grounds. The motion for new trial, as amended, was overruled. The defendant appeals to this court from this judgment. The enumeration of errors contains the substance of each and every ground of the motion for new trial as amended. Error is enumerated as follows: (2) The overruling of the defendant's motion for a judgment on the pleadings; (3) The overruling of defendant's motion to strike an amendment of plaintiff and to strike certain paragraphs of plaintiff's amendment; and (4) The evidence was insufficient to support the final judgment against defendant. Held:

1. The appellee filed a motion to dismiss based upon a failure to enumerate error on the denial of the motion for new trial. Since the appeal is from the judgment overruling the motion for new trial as amended, the motion to dismiss is without merit and is denied. Thus, the law of the case was not established against the appellant by the ruling on the motion for new trial from which there was no appeal, as found in Campbell v. State, 123 Ga. App 116 (179 SE2d 552). This case is not applicable here.

2. The lower court denied the motion for continuance which was based upon the doctor's affidavit. While the court did not pass upon the objections to the affidavit, it is not properly entitled in the cause, and was not admissible in evidence. Parks v. State, 110 Ga. 760 (1) (36 SE 73); Brucker v. O'Conner, 115 Ga. 95 (41 SE 245); Horton v. Fulton, 130 Ga. 466 (3) (60 ST 1059). For this reason alone the court did not abuse its discretion in refusing the continuance regardless of the other reasons for denying the same.

3. The only argument made as to the other errors complained of is as follows: "It is respectfully submitted that . . . (the court) . . committed the following reversible errors of a fatally prejudicial nature." and thereafter merely setting out the various specifications of error. The appellant having failed to properly argue the various grounds of his complaint according to the rules of this court the same cannot be considered. Underwood v. Ranger Mfg. Co., 116 Ga. App. 803 (159 SE2d 144);

Wall v. Rhodes, 112 Ga. App. 572 (1) (145 SE2d 756); Pinyan v. Liberty Mut. Ins. Co., 113 Ga. App. 130 (147 SE 2d 452); American Ins. Co. v. Guest Printing Co., 114 Ga. App. 775(3) (152 SE2d 794).

Judgment affirmed. Jordan, P. J. and Quillian, J., concur.

ARGUED JUNE 29, 1971 – DECIDED SEPTEMBER 9, 1971 –

REHEARING DENIED September 29, 1971 – CERT. APPLIED FOR.

Action for damages. DeKalb State Court. Before Judge Smith.

E. B. Shaw, for appellant.

Mackay & Elliott, Thomas W. Elliott, for appellee.

PETITIONER'S EXHIBIT B

GEORGIA, FULTON COUNTY:

Personally, before the undersigned attesting officer duly authorized by law to administer oaths, appeared DR. W. HARRISON REEVES, who, after being duly sworn, on oath deposes and says as follows:

My name is Dr. W. Harrison Reeves. I am a physician duly authorized by the State of Georgia to practice my profession in this State. I have been legally practicing my profession in this State since the _____ day of _____, 1952. My professional offices are located at 207 Doctors Building, 478 Peachtree Street, N.E., Atlanta, Georgia, 30308. Mr. Earl L. Watts has been a patient of mine since 11-18-70. He has also been examined by other doctors associated with me. My diagnosis and prognosis of his case is as follows:

Diabetes mellitus with visual disturbance (neuropathy). Prognosis to be determined.

Mr. Earl L. Watts is in urgent need of immediate medical treatment and possible hospitalization and is not in condition to take part in any kind of court trial or hearing. To do so would be extremely dangerous to him and could be fatal. In my opinion Mr. Watts will not be

able to take part in any kind of court trial or hearing, even with proper medical treatment and hospitalization for at least 75 days.

Sgd. W. Harrison Reeves

Sworn to and subscribed before me
this the 17 day of December, 1970.

Sgd. Eleanor S. Zuber

NOTARY PUBLIC
Notary Public, Georgia State At Large
My Commission Expires Jan. 29, 1973.

PETITIONER'S EXHIBIT C

IN THE STATE COURT FOR THE COUNTY OF DeKALB
STATE OF GEORGIA

ETHEL GRADY MYLIUS Plaintiff	)	CIVIL ACTION
VS.	)	CASE NO. A-89125
EARL L. WATTS Defendant	)	COMPLAINT

The petition of ETHEL GRADY MYLIUS respectfully shows the Court as follows:

1.

That the Defendant is EARL L. WATTS, 1663 Delia Drive, Decatur, DeKalb County, Georgia, who is subject to the jurisdiction of this honorable court and may be served with a copy of this complaint at the foregoing address.

2.

That the Defendant has damaged Plaintiff in the sum of $10,000.00 plus interest, punitive damages and attorney fees, by reason of the facts hereinafter set forth.

3.

That on or about August 25, 1970, Defendant by misrepresentation induced Plaintiff to purchase an alleged

5% interest in an option to purchase the Candler Hotel located in Decatur, DeKalb County, Georgia, by entering into an agreement with Defendant, a copy of said agreement being attached hereto as Exhibit A and made a part hereof by reference thereto.

4.

That Plaintiff paid Defendant pursuant to the terms of said agreement the sum of $10,000.00.

5.

That Plaintiff paid said $10,000.00 and signed said agreement dated August 25, 1970 which is attached hereto as Exhibit A, upon representation that he had said Candler Hotel approved by the State and Federal Government as a federally approved convalescent home. Further, that Defendant had funds allocated from the Department of Health, Education and Welfare to subsidize the operation of said convalescent home, thereby guaranteeing a gross annual income sufficient to give the Plaintiff a $17,500.00 return on her investment. Defendant further represented that his net worth was $2,000,000.00, that he had $10,000.00 cash equity in said Candler Hotel and that said investment was a sure thing.

6.

That Defendant's representations were false.

7.

That said representations were material, were relied on by Plaintiff as an inducement to obtain Plaintiff's signature on said agreement and payment of said $10,000.00.

8.

That Plaintiff relied on said representations as being true, and at the time of making same Defendant knew that the same were false.

9.

That said Defendant's representations were made with false design and for the purpose and intent of deceiving and defrauding Plaintiff.

10.

That Defendant's representations did deceive and defraud Plaintiff in that she signed said agreement and paid to Defendant the sum of $10,000.00.

11.

That as the result of said misrepresentations, Defendant has damaged Plaintiff in the sum of $10,000.00.

12.

That Plaintiff relied on and believed said representations of Defendant to be true and did not know the same was false at the time she signed said agreement and paid Defendant the sum of $10,000.00.

13.

That Plaintiff has made demand on Defendant for return of said $10,000.00 and Defendant has failed and refused to return the same.

14.

That Defendant's actions have been in bad faith as aforesaid and have willfully and deliberately deceived Plaintiff.

15.

That in addition to Plaintiff's actual loss of $10,000.00, Plaintiff is entitled to additional $25,000.00 as punitive damages to deter Defendant from future actions as set forth herein. That as the result of Defendant's bad faith ab initio in deceiving Plaintiff and causing her unnecessary trouble and expense, Plaintiff is further entitled in addition to actual loss and punitive damages, necessary and reasonable attorney fees in the sum of $5,000.00 to cover expenses of litigation

WHEREFORE, Plaintiff prays:

(a) That process issue directed to the Defendant requiring him to answer this complaint as by law provided;

(b) That Plaintiff be granted a judgment against Defendant in the sum of $10,000.00 principal, interest at the legal rate, $25,000.00 punitive damages, $5,000.00

attorney fees, together with cost of this proceeding being taxed against the Defendant.

MACKAY & ELLIOTT

By Sgd. Thomas W. Elliott

Thomas W. Elliott
Of Counsel for Plaintiff

500 First Natl. Bank Bldg.
Decatur, Georgia 30030

GEORGIA, DeKALB COUNTY:

THIS AGREEMENT, made and entered into this the 25th day of August, 1970, by and between EARL L. WATTS, hereinafter referred to as Party of the First Part, and ETHEL GRADY MYLIUS, hereinafter referred to as Party of the Second Part; and

WITNESSETH, That party of the First part is the holder of an option to purchase the property known as CANDLER HOTEL, in Decatur, Georgia – DeKalb County; said option being dated February 2nd, 1970, and said option terminates on February 2nd, 1971; and

WITNESSETH, that party of the Second part desires to purchase a five (5%) per cent interest in said option, which shall at the time of the closing of the purchase of said CANDLER HOTEL, entitle Party of the Second Part a five (5%) per cent interest in said property, which property is located at 150 East Ponce DeLeon Avenue, Decatur, DeKalb County, Georgia; and

THEREFORE IT IS AGREED AS FOLLOWS:

(1) That for and in consideration of Party of the Second Part paying to Party of the First Part the sum of $25,000.00, Party of the First Part agrees that Party of the Second Part shall own a five (5%) per cent interest in said option herein referred to, and, at the time of the purchase of the said CANDLER HOTEL property in accordance with the terms of said option, Party of the Second Part shall own a five (5%) per cent interest in said Candler Hotel Property.

(2) That, in further consideration of Party of the Second Part paying to Party of the First Part said sum of $25,000.00 the Party of the First Part agrees that Party of the Second Part shall receive a five (5%) per cent interest of the net profits, after the purchase of the said CANDLER HOTEL property, and the business of a Personal Care Home begins operation on said property. Said Five (5%) per cent net profits from said business, payable to Party of the Second Part, shall begin three (3) months after said Personal Care Home begins operation, and every three (3) months thereafter.

(3) Said sum of $25,000.00 shall be paid as follows:

(a) $10,000.00 Cash at the time of entering this agreement.

(b) The balance of $15,000.00 to be paid on or before February 25th, 1971.

(4) Party of the Second Part agrees to assist and cooperate with Party of the First Part in obtaining a loan for the purchase of the said CANDLER HOTEL property, and party of the second part shall own Five 5% Per Cent of said property when said purchase is made.

(5) Both Parties agree that a part of said sum of $25,000.00 shall be used for the expenses of appraisal and loan costs in obtaining the purchase of said CANDLER HOTEL property.

(6) Party of the Second Part has read this agreement before signing same, and does hereby enter into said agreement freely and voluntarily, and without any undue influence being used in any way to influence party of the second part to enter this agreement.

IN WITNESS HEREOF, the Parties hereto have signed their names and affixed their seals the day and year first above written, which is this the 25th day of August, 1970.

Sgd. Earl L. Watts (SEAL)

EARL L. WATTS – Party of the First Part

Sgd. Ethel Grady Mylius (SEAL)

ETHEL GRADY MYLIUS – Party of the Second Part

Signed, sealed and delivered in the Presence of:

Sgd. Charlotte F. Leach

Witness

Sgd. Neill Leach

Notary Public.

PETITIONER'S EXHIBIT D

IN THE STATE COURT FOR THE COUNTY OF DEKALB, STATE OF GEORGIA

ETHEL GRADY MYLIUS, PLAINTIFF	CIVIL ACTION NO. A-89125
VS.	CIVIL COMPLAINT
EARL L. WATTS, DEFENDANT	

ANSWER:

Now comes the defendant, EARL L. WATTS, in the above stated case, and, with leave of the Court first having been obtained files this his answer, and shows the following:

1.

Defendant admits paragraph 1 of said complaint.

2.

Defendant denies paragraph 2 of said complaint.

3.

Defendant denies that portion of paragraph 3 of said complaint which states, "Defendant by misrepresentation induced plaintiff to purchase an alleged 5% in an option."

4.

Defendant shows that, in answer to paragraph 4 of said complaint, plaintiff freely and voluntarily made an investment as shown in said EXHIBIT "A".

5.

Defendant denies paragraph 5 of said complaint, as pled, and demands strict proof on said allegations.

6.

Defendant denies paragraph's 6,7,8,9,10,11,12,14 and 15 of said complaint, and demands strict proof of said allegations.

7.

Defendant, in answer to paragraph 13 of said complaint, shows that he is ready, willing and able to comply with the terms as shown in said EXHIBIT "A" of plaintiff's complaint.

FIRST DEFENSE:

That all of the allegations concerning fraud and misrepresentation as alleged in plaintiff's complaint are untrue, which fact is well known to plaintiff.

SECOND DEFENSE:

That, at the time of signing said agreement, plaintiff knew that the option in the Candler Hotel Property did not expire until February, 1971; that plaintiff further knew that said sum of $10,000.00 would be invested in said Candler Hotel Property at the time said option was to be exercised.

WHEREFORE, Defendant Prays that plaintiff's complaint be dismissed, with the costs of this action assessed against the plaintiff.

Sgd. E. B. Shaw

Attorney for Defendant

116 Pryor Street, S.W., Suite 203
Fulton Nat. Bank Bldg.,
(Capitol Area Branch)
Atlanta, Georgia 30303
688-6785

GEORGIA, DEKALB COUNTY:

Personally, before the undersigned attesting officer duly authorized by law to administer oaths, appeared EARL L. WATTS, who, after first being sworn, on oath deposes and says that the facts and allegations contained in this his foregoing answer and defenses are true and correct to the best of his knowledge and belief.

Sgd. Earl L. Watts

Defendant

Sworn to and subscribed before me
this the 5 day of November, 1970.

Sgd. Edgar B. Shaw

NOTARY PUBLIC

Edgar B. Shaw
Notary Public, Fulton County, Georgia
My Commission Expires Oct. 2, 1972

PETITIONER'S EXHIBIT E

IN THE STATE COURT FORTHE COUNTY OF DeKALB
STATE OF GEORGIA

ETHEL GRADY MYLIUS	)	
Plaintiff	)	CIVIL ACTION
vs.	)	CASE NO. A-89125
EARL L. WATTS	)	FIRST AMENDMENT
Defendant	)	

Now comes the Plaintiff and amends her petition as follows:

1.

By making paragraphs 1 through 15 and the prayers thereof COUNT I.

2.

By adding thereto COUNT II as follows:

COUNT II

1.

Paragraphs 1, 2, 3 and 4 of COUNT I are incorporated herein and made a part hereof by reference thereto as paragraphs 1, 2, 3 and 4 of COUNT II.

5.

That said agreement or contract is a security as defined by the Georgia Securities Act.

6.

That Defendant has not complied with the Georgia Securities Act in registration of said Agreement as by law provided.

7.

That Plaintiff does hereby elect to void said Agreement and does hereby tender to Defendant said Agreement and Contract for the return of the sum of Ten Thousand and No/100 ($10,000.00) Dollars paid Defendant together with interest from August 25, 1970, plus reasonable attorney fees as set forth hereinafter.

8.

That in addition to said Ten Thousand and No/100 ($10,000.00) Dollars and interest, Plaintiff is entitled to punitive damages in the sum of Twenty-five Thousand and No/100 ($25,000.00) Dollars to deter Defendant from future action as set forth herein. That Plaintiff has caused Defendant unnecessary trouble and expense in having to bring this action, and she is entitled to necessary and reasonable attorney fees in the sum of Five Thousand and No/100 ($5,000.00) Dollars to cover expenses of litigation.

WHEREFORE, Plaintiff prays:

(a) That Plaintiff be granted a judgment on Count II against Defendant in the sum of Ten Thousand and No/100 ($10,000.00) Dollars principal, interest at the legal rate from August 25, 1970, Twenty-five Thousand and No/100 ($25,000.00) Dollars punitive damages, Five Thousand and No/100 ($5,000.00) Dollars attorney fees, together with cost of this proceeding being taxed against the Defendant.

MACKAY & ELLIOTT

By Thomas W. Elliott

Thomas W. Elliott
Of Counsel for Plaintiff

500 First National Bank Building
Decatur, Georgia 30030
378-4549

PETITIONER'S EXHIBIT F

IN THE STATE COURT FOR THE COUNTY
OF DEKALB, STATE OF GEORGIA

ETHEL GRADY MYLIUS,	)	CIVIL ACTION NO.
Plaintiff	)	A-89125
vs.	)	
EARL L. WATTS,	)	
Defendant	)	

MOTION

Now comes the defendant, EARL L. WATTS, defendant, in the above stated case, and moves for a judgment in his favor on the following grounds.

1.

Defendant moves for a judgment on the pleadings in his favor on the ground that they show without any genuine issue as to any material fact that the defendant is entitled to said judgment in his favor. (Georgia Code Section 81A-112 (h) (2).

2.

Defendant moves, to dismiss plaintiff's petition as amended on the ground that same does not set forth any cause of action against the defendant. That said petition does not state a claim upon which relief can be granted.

3.

Defendant moves to strike the amendment of plaintiff on the following grounds: that said amendment contains immaterial and impertinent matter and does not support in any legal or equitable sense the petition of plaintiff or the allegations in her said amendment. (Georgia Code Section 81A-112 (f).

4.

Defendant moves to strike paragraph 5 of plaintiff's amendment, "That said agreement or contract is a security as defined by the Georgia Securities Act," on the ground that it is merely a conclusion and argument without any allegations of fact or principles of law to support it.

5.

Defendant moves to Strike paragraph 6 of the amendment "That defendant has not complied with the Georgia Securities Act in registration of said Agreement as by law provided", on the ground that it is a mere conclusion without any allegations of fact or principles of law to support it. That said agreement is not required to be registered under the law.

6.

Defendant moves to strike paragraph 7 of plaintiff's amendment on the following grounds: That plaintiff has no authority under the law to "void said agreement." It is binding upon both plaintiff and defendant. That said paragraph consists of conclusions and arguments of the plaintiff without any allegations of fact or principles of law to support them. That said paragraph is illegal, inflammatory and highly prejudicial to the defendant. The plaintiff is not entitled under the pleadings and the applicable law to any sums sought by her in said paragraph.

WHEREFORE, defendant demands that said complaint of plaintiff, as amended, be dismissed.

Sgd. E. B. Shaw

Attorney for Defendant

116 Pryor STreet, S.W., Suite 203
Fulton National Bank Bldg.
(Capitol Area Branch)
ATlanta, Ga. 30303
688-6785

CERTIFICATE OF SERVICE:

I hereby certify that I have personally served a copy of the foregoing motion on Mr. Thomas W. Elliott, Attorney of record for the plaintiff, 500 First National Bank Bldg., Decatur, Georgia 30030.

This the 22 day of December, 1970.

Sgd. E. B. Shaw

Attorney for Defendant

SUPR... COURT, U. S.
MICHEL... JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1164

EARL L. WATTS,
Petitioner in Certiorari,

vs.

ETHEL GRADY MYLIUS,
Respondent in Certiorari.

RESPONSE

Of Ethel Grady Mylius to Petition for Writ of Certiorari to the Court of Appeals of Georgia

MACKAY & ELLIOTT
JAMES A. MACKAY
THOMAS W. ELLIOTT
Suite 500, One West Court Square
Decatur, Georgia 30030
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1164

EARL L. WATTS,
Petitioner in Certiorari,

vs.

ETHEL GRADY MYLIUS,
Respondent in Certiorari.

RESPONSE

Of Ethel Grady Mylius to Petition for Writ of Certiorari to the Court of Appeals of Georgia

JURISDICTION OF SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This Honorable Court should deny jurisdiction of Petitioner's Application for Writ of Certiorari in that applicant has failed to state the facts of this case completely

and accurately and has failed to properly present to this Court a Federal question of any gravity and magnitude.

This case came on regularly for hearing on December 22, 1970. Appellant presented a medical affidavit to attempt to postpone the trial of this case. Appellee demanded a legal showing and production of the person of Appellant. This affidavit **did not** recite that it was given for use in a continuance hearing on a certain date nor was it styled up with the caption name and lower court case number as provided by law. Further, this affidavit was not introduced in evidence but merely filed as part of the case record. The evidence relative to Appellant's motion for continuance is void of any statement from Appellant's counsel that he cannot go to trial safely without Appellant's presence.

The transcript of evidence shows clearly that at the time of trial there were two felony warrants outstanding for Appellant, one for **Theft by Deception** and the other for **Violation of Georgia Securities Act.**

The transcript further shows that Appellant had not been arrested and was a fugitive from justice on these two felony charges. Counsel for Appellant stated to the court that he did not know the **whereabouts** of his client.

In this connection I quote from page 7 of the transcript of evidence in this case.

> "Mr. Shaw: I want to pursue this further, Your Honor. I do not know where Mr. Watts is. I do not know where he is.
>
> The Court: All right. All right, the Court does not —I don't think I implied, and I certainly didn't mean to imply, that you did know his whereabouts, Mr. Shaw.
>
> Mr. Shaw: I'll be honest with you, I do not know his whereabouts.
>
> The Court: No, sir. All right."

The application of Mr. Watts on its face would make it appear that the Court was putting on trial a poor sick man. The foregoing additional facts clarifies this point. If he is seriously ill, then why didn't his trial court attorney know his whereabouts?

The application was not introduced into evidence. Even if it had been, it would not be admissible since the same was not in proper form. **Brucker v. O'Conner**, 115 Ga. 95 (4) (41 S.E. 245). In **Terry v. The State**, 15 Ga. App. 108, it was held that where the whereabouts of a witness was not known, so that his attendance could be assured for the next term, the failure to grant a continuance was not an abuse of discretion. It is provided under Georgia law that applications for continuance are addressed to the sound discretion of the Court.

> "**Ga. Code 81-1410 (5724;992 P.C.), Counter-showing and discretion of court.** All applications for continuances are addressed to the sound discretion of the court, and, if not expressly provided for, shall be granted or refused as the ends of justice may require. In all cases the presiding judges may, in their discretion, admit a counter-showing to a motion for a continuance, and, after a hearing, may decide whether the motion shall prevail (Acts 1871-2, p. 49)."

From the facts in evidence before the trial court I am certain that the court concluded that the affidavit was not legal evidence since it was not in proper form. Further, that said affidavit was a sham and an attempt to delay the plaintiff's case, since counsel for Mr. Watts stated that he did not know his whereabouts. The trial court detected that apparently Mr. Watts was hiding from the authorities to prevent arrest based on outstanding warrants and that his acts were not in good faith and that the ends of justice required that the plaintiff be allowed to proceed.

I note on page 16 of Petitioner in Certiorari's Application, facts outside the record; namely, in the second paragraph it is stated: ". . . The First Party, however, secured a loan for the purchase of said property for the price of $350,000.00 agreed upon in the option and consummated said sale and is now operating a Personal Care Home on said property in the name of Candler Manor, Inc." This evidence was not presented at the trial, has not been subjected to cross-examination, and it is highly improper for counsel to interject evidence not sworn to and which is irrelevant and immaterial to this case.

Either of the foregoing reasons is sufficient to deny applicant's Writ.

In the Court of Appeals of the State of Georgia, applicant's statement of enumeration of errors failed to enumerate and include any State of Georgia or United States constitutional ground as a reason for reversal. Not having raised a federal question of gravity and importance in the State Court, applicant cannot now raise a federal question for the first time. Ellis v. Dixon, N.Y. 1955, 75 S. Ct. 850, 349 U.S. 458, 99 L.Ed. 1231, rehearing denied 76 S. Ct. 37, 350 U.S. 855, 100 L.Ed. 759.

The application for Writ of Certiorari should be denied.

Respectfully submitted

MACKAY & ELLIOTT

JAMES A. MACKAY

THOMAS W. ELLIOTT

Attorneys for Respondent

Suite 500
One West Court Square
Decatur, Georgia 30030

Certificate of Service

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States mail, a copy of same in a properly addressed envelope with adequate postage thereon.

This the 5 day of April, 1972.

Mackay & Elliott

By .....
James A. Mackay
Attorneys for Respondent

SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1164

EARL L. WATTS,

Petitioner in Certiorari

vs.

ETHEL GRADY MYLIUS,

Defendant in Certiorari

PETITION OF EARL L. WATTS FOR REHEARING ON ORDER OF APRIL 24, 1972, DENYING HIS PETITION FOR WRIT OF CERTIORARI.

G. SEALS AIKEN,
Attorney for Petitioner,
Suite 1626 Candler Bldg.,
Atlanta, Georgia 30303

Supreme Court of the United States

OCTOBER TERM, 1971

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EARL L. WATTS,

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PETITION OF EARL L. WATTS FOR REHEARING ON ORDER OF APRIL 24, 1972, DENYING HIS PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Earl L. Watts files this his petition for rehearing on the order of April 24, 1972 of this Court denying his petition for a writ of certiorari to the Court of Appeals of Georgia for the purpose of having reviewed, corrected, and reversed the decision and judgment of that Court of September 9, 1971 affirming the order of Judge Jack B. Smith of the State Court of DeKalb County, Georgia of April 7, 1971 denying the motion of your petitioner as amended for a new trial in the case of Ethel Grady Mylius vs. Earl L. Watts in the latter Court for alleged

fraud and deceit, in which a judgment was rendered by said Judge Smith against Watts on December 22, 1970 for $10,000.00 principal, plus interest from August 25, 1970 in the sum of $233.33, and attorney fees in the sum of $3,000.00, IN THE ENFORCED ABSENCE OF WATTS DUE TO HIS SERIOUS ILLNESS AS SHOWN BY THE AFFIDAVIT OF HIS ATTENDING PHYSICIAN, DR. W. HARRISON REEVES, and despite the motion of E. B. Shaw as attorney for Watts for a continuance on said ground, and over his strenuous objection as a denial of Due Process of Law and of Equal Protection of the Law in violation of Section I of Amendment XIV of the U.S. Constitution. It is believed that this Honorable Court has very obviously overlooked the following material facts and controlling decisions in denying the petition for certiorari in this case, because they require, in the opinion of counsel for petitioner, the grant of the writ of certiorari under U.S. Code, Title 28, Section 1257 (3) and Section I of Amendment XIV of the United States Constitution.

The decision of the Court of Appeals of Georgia of September 9, 1971, unless reversed by this Court, will deprive petitioner, a citizen of Georgia and of the United States, of his property to the extent of the amount of the judgment rendered against him by Judge Jack B. Smith of the State Court of DeKalb County, Georgia on December 22, 1970 and other substantial damages resulting therefrom by depriving him of Due Process of Law and of Equal Protection of the Law granted to other persons in like circumstances and similar situations, in violation of Section I of Amendment XIV of the United States Constitution in the following particulars:

1. In upholding Judge Jack B. Smith in arbitrarily and capriciously denying, in violation of Georgia Code Section 81-1412 and Section I of Amendment XIV of the U.S. Constitution, the motion of petitioner's counsel for a continuance on the ground that petitioner was seriously

ill and unable to attend court for that reason as shown by the uncontradicted affidavit of his attending physician, Dr. W. Harrison Reeves, submitted to Judge Smith by petitioner's counsel, a copy of which is attached to the petition for certiorari as Exhibit B.

2. In upholding Judge Jack B. Smith in arbitrarily and capriciously denying, in violation of Section I of Amendment XIV of the U.S. Constitution, the motion of petitioner's counsel for a judgment in his favor on the pleadings on the ground that they showed without any genuine issue as to any material fact that he was entitled to said judgment as a matter of law.

3. In upholding Judge Jack B. Smith in arbitrarily and capriciously rendering, in violation of Section I of Amendment XIV of the U.S. Constitution, the judgment against your petitioner for $10,000.00 plus interest from August 25, 1970 in the sum of $233.33 and attorney fees in the sum of $3,000.00 when there was no competent or legal evidence whatever or law to support said judgment.

4. In upholding Judge Jack B. Smith in arbitrarily and capriciously refusing to hold, in violation of Section I of Amendment XIV of the U.S. Constitution, that the contract between Ethel Grady Mylius and Earl L. Watts of August 25, 1970, upon which the suit of the former against the latter was based and a copy of which was attached thereto and also to the petition for certiorari as a part of Exhibit C, DEMANDED A JUDGMENT AS A MATTER OF LAW AGAINST THE SAID ETHEL GRADY MYLIUS AND FOR YOUR PETITIONER.

5. In upholding Judge Jack B. Smith in arbitrarily and capriciously refusing to hold, in violation of Section I of Amendment XIV of the U.S. Constitution, that the petition of Ethel Grady Mylius, as amended with the

contract of August 25, 1970 attached thereto did not show or set forth any cause of action whatever against Earl L. Watts but, on the contrary, showed that she was indebted to him in the sum "of $15,000.00 to be paid on or before February 25th, 1971."

6. In holding that the affidavit of Dr. W. Harrison Reeves that your petitioner was seriously ill and unable to attend any kind of court hearing or trial was "not properly entitled in the case, and was not admissible in evidence," and that "For this reason alone the court did not abuse its discretion in refusing the continuance regardless of the other reasons for denying the same," although Dr. Reeves was not a party in the case and the law did not require his affidavit to be "entitled in the cause," thereby violating Georgia Code Section 81-1412 and Section I of Amendment XIV of the U.S. Constitution.

The argument amplifying the reasons relied on for the allowance of the writ of certiorari and the authorities supporting the same are set forth on pages 10 through 21 of the petition for certiorari and will not be repeated here, but special attention is invited thereto.

In the original complaint of Plaintiff Mylius she contends that Defendant Watts "by misrepresentation induced plaintiff to purchase an alleged 5% interest in an option to purchase the Candler Hotel * * * by entering into an agreement with defendant, a copy of said agreement being attached hereto as Exhibit A and made a part hereof by reference thereto." Reference to said contract, however, will show that it is valid, legal, and unambiguous and specifically states: "(6) Party of the Second Part has read this agreement before signing same, and does hereby enter into said agreement FREELY AND VOLUNTARILY, AND WITHOUT ANY UNDUE IN-

FLUENCE, BEING USED IN ANY WAY TO INFLUENCE PARTY OF THE SECOND PART TO ENTER THIS AGREEMENT."

The contention of Plaintiff Mylius in her complaint that Defendant Watts "by misrepresentation induced plaintiff to purchase an alleged 5% interest in an option to purchase the Candler Hotel" IS UTTERLY FALSE AS SHOWN BY THE COPY OF THE CONTRACT SIGNED BY HER AND ATTACHED TO HER COMPLAINT, stating "That Party of the First Part (Watts) is the holder of an option to purchase the property known as CANDLER HOTEL in Decatur, Georgia — DeKalb County; said option being dated February 2nd, 1970, and said option terminates on February 2nd, 1971" and "that Party of the Second Part (Mylius) DESIRES TO PURCHASE A FIVE (5%) PER CENT INTEREST IN SAID OPTION, which shall at the time of the closing of the purchase of said CANDLER HOTEL, entitle Party of the Second Part (Mylius) a five (5%) per cent interest in said property * * *."

Defendant Watts was prepared and expected to show on the trial of said case (if continued, as required by law, until he was physically able to appear) that Plaintiff Mylius came to the office of the Candler Hotel while he was there and stated she wanted to buy an interest in his said option to buy the Candler Hotel; that from time to time thereafter she came to see him at his property at 694 Durant Place, Atlanta, Georgia, where he had an office, and sought to secure an interest in the Candler Hotel property; that she also called him many times on the phone seeking to obtain from him an interest in said property; that finally on August 25, 1970 she came again to his office at 694 Durant Place seeking to secure an interest in said property and he went with her to the office of Mr. E.B Shaw, Attorney, 116 Pryor St., S.W., Atlanta, Georgia, AT HER REQUEST for the purpose of drawing up and executing a contract with her conveying

to her the interest she sought in the Candler Hotel; that Mr. Shaw drew up said contract according to what Plaintiff Mylius and Defendant Watts had orally agreed upon pertaining to said property; that, after drawing up said contract, Mr. Shaw read it over to Plaintiff Mylius in the presence of Defendant Watts, and Judge and Mrs. Neill Leach, who witnessed the contract; that Mr. Shaw asked Plaintiff Mylius whether she had been induced against her will to agree to this contract, and she told him that she had not and that she was entering into said agreement freely and voluntarily and without any undue influence being used in any way to influence her to enter into said agreement.

The contract provides that upon the payment of $10,000.00 by the second party to the first party at the time of entering the contract and $15,000.00 on or before February 25th, 1971, the second party would receive a five per cent interest in said option and upon the purchase of the property a five per cent interest therein and in the net profits of the business of a Personal Care Home to be operated on said property. It provided that the Second Party would assist and co-operate with Party of the First Part in obtaining a loan for the purchase of said Candler Hotel property and that a part of the $25,000.00 paid by Second Party to the First Party would be used for the expenses of appraisal and loan costs in obtaining the purchase of said property.

The Second Party voluntarily paid the $10,000.00 to the First Party on the date the contract was signed but never paid the balance of $15,000.00 she agreed to pay or any part thereof and did not assist and cooperate with Party of the First Part in any manner in obtaining a loan for the purchase of the property as she agreed in said contract to do. Defendant Watts was prepared and expected to show on the trial of said case (if continued until he was physically able to appear, as required by law) that Plaintiff Mylius conspired and acted in concert

with other persons by swearing out false and malicious felony warrants against him, causing him to be arrested and imprisoned thereunder, and slandering and harassing him personally and in his business to prevent him from securing said property and to secure it for themselves instead, but that despite their said malicious and lawless conduct, he succeeded in securing a loan to apply on the purchase price of $350,000.00 for said property and consummated said sale and is now operating a Personal Care Home for Retired Persons on it in the name of Candler Manor, Inc. Before Plaintiff Mylius filed said suit against Defendant Watts, she swore out two felony warrants against him, one for Theft by Deception and the other for Violation of Georgia Securities Act, without any justification whatever in fact or law, for the purpose of intimidating and blackmailing Defendant Watts into returning to her the $10,000.00 she voluntarily invested in said option under said contract with him. Judge Smith allowed Counsel for Plaintiff Mylius to state on the trial of this case (in the enforced absence of Defendant Watts due to his serious illness) "we have two felony warrants out for Mr. Earl L. Watts, one for Theft by Deception and the other Violation of Georgia Securities Act. * * * Now, he's playing 'footsey' with the court. * * * Your Honor has the right, according to the law, without it being abusive, to put this case on trial. Justice demands that this gentleman surrender himself to the authorities, and the lawyer has not stated to this court as to the whereabouts of this man." Judge Smith then stated: "What do you mean 'the authority'? Has he not been arrested on these criminal warrants?" Mr. Elliott as attorney for Plaintiff Mylius then stated: "No, sir. Your Honor, he's a fugitive from justice on two felonies — two felony warrants right now. I understand through the authorities that he promised to turn himself in, make bond, and so forth and come before the court as to the two felony charges. We insist * * * that we go to trial on this matter today * * *." Mr. Shaw as attorney for Defendant Watts then invited the Court's attention to

Gideon vs. Wainwright, 372 U.S. 335, 83 S. Ct. 792, and Ferguson vs. State of Georgia, 365 U.S. 570, 81 S.Ct. 756, in support of his motion for a continuance. He vigorously contended that Defendant Watts had the right to be represented by counsel and that his counsel had the right to have the client in court at the trial; that he could not properly represent him without his being in court and that he (Watts) would be deprived of Due Process of Law in violation of the Constitution, by trying his case in his absence while he was seriously ill and not able to attend court as shown by the affidavit of his physician, Dr. Reeves. Judge Smith then stated in part: "All right, if this man had come in and surrendered himself, made bond on criminal proceedings and if some doctor had come in, I would grant the motion but under the circumstances I have discretion in the case and I've got to look after the plaintiff's rights as well as the defendant's rights. I am going to go ahead and declare this case on trial and, of course, if we get to such particular point where The Court feels that his rights are being jeopardized or if he has reason to order a continuance, I can always declare a mistrial and put it over to some date in the future, I am going to let the case proceed." Judge Smith then proceeded to try the case in the absence of Mr. Watts and rendered judgment against him as aforesaid (T.39-44, 79).

Before the trial started, Mr. Shaw also presented and had filed as a part of the record with the approval of Judge Smith the following written motion: "I move for a continuance on the ground that my client is not able to attend court and will not be able to attend court for approximately seventy-five (75) days as shown by the affidavit of his physician, which I am submitting to you. I am not in a position to try this case without my client or when he is physically unable to be present and cooperate with me in the trial of it. If said motion is refused for continuance, I respectfully note an exception

thereto upon the following grounds: (a) It would deprive the defendant of his property without Due Process of Law and without Equal Protection of the Law and in violation of Article I, Section I, Paragraphs I, II, III, IV, V, and XXIII of the Georgia Constitution and Amendments V, IX, and X of the U.S. Constitution as applied to the states by Section I of Amendment XIV thereof. I respectfully call your Honor's attention to the following cases: Gideon vs. Wainwright, 372 U.S. 335, and Ferguson vs. State of Georgia, 365 U.S. 570." It was overruled by Judge Smith by proceeding to try the case in your Petitioner's absence.

At the instance of Plaintiff Mylius and the persons conspiring with her, the Grand Jury of DeKalb County Georgia at the March Term, 1971 returned a special presentment charging Defendant Watts with Theft BY Deception as therein described based upon the warrant to said effect sworn out by Plaintiff Mylius. Defendant Watts was not able in his seriously ill condition at that time as described in the affidavit of Dr. Reeves to surrender himself to the sheriff or make bond in response to said felony warrants and special presentment. Thereafter he was arrested and imprisoned and made bond and appeared for trial several times but the said criminal cases were never tried and his counsel therein advised him that they were placed on the "dead docket." Defendant Watts was prepared and expected to show on the trial of said criminal cases that he was not guilty of either of said alleged felonies and that they were made against him by Plaintiff Mylius with the aid and cooperation of G.L. Ledbetter and L. Louvenia Kundtz pursuant to a conspiracy to prevent him from securing the Candler Hotel property under his option thereon, in violation of Ga. Code Sections 26-1801 and 26-1901.

In the brief of Appellee Mylius in the Court of Appeals in her civil case against Defendant Watts, her counsel stated that he made a counter showing to the

motion of Mr. Shaw, as attorney for Watts for a continuance by reason of his illness; that he "stated to the court that there were two felony warrants outstanding for appellant, one for theft by deception and the other for violation of Georgia Securities Act," and "that Appellant had not been arrested and was currently a fugitive from justice on these two felony charges."

In the response of Defendant in Certiorari in this Court she states that "The evidence relative to Appellant's motion for continuance is void of any statement from Appellant's counsel that he cannot go to trial safely without Appellant's presence."

Attorney Shaw vigorously contended before Trial Judge Smith that Defendant Watts had the right to be represented by counsel and that his counsel had the right to have him in court at the trial; that his counsel could not properly represent him without his being in court, and that he (Watts) would be deprived of Due Process of Law according to the Constitution by trying his case in his absence while he was seriously ill and unable to attend court as shown by the affidavit of his physician, Dr. Reeves. Mr. Shaw submitted said affidavit of Dr. Reeves to Judge Smith and filed with him as his Exhibit 2 and read to him the following Motion: "I move for a continuance on the ground that my client is not able to attend court and will not be able to attend court for approximately seventy-five (75) days as shown by the affidavit of his physician, which I am submitting to you. I am not in a position to try this case without my client or when he is physically unable to be present and cooperate with me in the trial of it. If said motion is refused for continuance, I respectfully note an exception thereto upon the following grounds: (a) It would deprive the defendant of his property without Due Process of Law and without Equal Protection of the Law and in violation of Article I, Section I, Paragraphs I, II, III, IV,

V, and XXIII of the Georgia Constitution and Amendments V, IX, and X of the U.S. Constitution as applied to the states by Section I of Amendment XIV thereof. I respectfully call your Honor's attention to the following cases: Gideon vs. Wainwright, 372 U.S. 335, and Ferguson vs. State of Georgia, 365 U.S. 570."

On page 3 of the response of Mrs. Mylius she contends that the affidavit of Dr. Reeves "was a sham and an attempt to delay the plaintiff's case," without any evidence whatever to support this contention. She also contends on page 3 of said response that "The trial court detected that apparently Mr. Watts was hiding from the authorities to prevent arrest based on outstanding warrants and that his acts were not in good faith and that the ends of justice required that the plaintiff be allowed to proceed," without any evidence or law whatever to support this contention.

Respondent contends on page 4 of her response that your petitioner has not raised "a federal question of gravity and importance in the State Court" and that he "cannot now raise a federal question for the first time." This is incorrect. He raised Federal Questions of Gravity and Importance in the State Court of DeKalb County, the Court of Appeals of Georgia, and The Supreme Court of Georgia, and urged said Federal questions in his Petition to this Court for a writ of certiorari. It has already been pointed out how he raised the Federal Constitutional questions in the State Court. He contended orally and in writing in the Court of Appeals that "The State Court of DeKalb County, Georgia, erred in granting and awarding a judgment to appellee on December 22nd, 1970, and in depriving appellant of property without due process of law and without equal protection of the law and in violation of Article I, Section I, Paragraphs I, II, III, IV, V and XXIII of the Georgia Constitution and Amendments V, IX and X of the U.S. Constitution as

applied to the States by Section I of Amendment XIV thereof." He urged the same Federal constitutional ground in his petition to the Supreme Court of Georgia for a writ of certiorari to the Court of Appeals of Georgia. The particulars in which petitioner was deprived of his property without Due Process of Law and of Equal Protection of the Law are set forth in his petition to this Court for certiorari.

It will be observed from the foregoing, and especially in light of the Petition for Certiorari, that petitioner has been deprived of HIS DAY IN COURT in violation of Section I of Amendment XIV as construed and applied by this Court in *Hovey vs. Elliott, 167 U.S. 409, 17 S.Ct. 841*, holding in part as follows:

> "In Galpin v. Page, 18 Wall. 350, the court said (page 368): 'It is a rule as old as the law and never more to be respected than now, that no one shall be personally bound until he has had HIS DAY IN COURT, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination: It is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'
>
> "Again, in Ex Parte Wall, 107 U.S. 289, 2 S.Ct. 569, the court quoted with approval the observations as to 'due process of Law' made by Judge Cooley in his Constitutional Limitations, at page 352, where he says: 'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under

the protection of the general rules which govern society.'

"And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry,' and 'render judgment only after trial.'"

Petitioner concludes this petition for rehearing with the following quotations from the Holy Bible:

"The Lord executeth righteousness and judgment for all that are oppressed," Psalm 103:6.

"For God shall bring every work into judgment, with every secret thing, whether it be good, or whether it be evil." Ec. 12:14.

"For there is nothing covered, that shall not be revealed; neither hid, that shall not be known." Luke 12:2.

"In the day, when God shall judge the secrets of men by Jesus Christ according to my gospel." Romans 2:16.

"Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God, and they that resist shall receive to themselves damnation. For rulers are not a terror to good works but to the evil. Wilt

thou then not be afraid of the power? Do that which is good and thou shalt have praise of the same." Romans 13:1-3.

WHEREFORE, Petitioner earnestly and urgently appeals to this Honorable Court to grant this petition for a rehearing on its order of April 24 1972 denying his petition for writ of certiorari and that it now grant said writ to the Court of Appeals of Georgia to review, correct, and reverse its decision of September 9 1971 affirming the order of Judge Jack B. Smith of the State Court of DeKalb County, Georgia of April 7, 1971 DEPRIVING PETITIONER OF HIS DAY IN COURT IN VIOLATION OF SECTION I OF AMENDMENT XIV OF THE U.S. CONSTITUTION.

Respectfully submitted,

G. SEALS AIKEN,
Attorney for Petitioner

1626 Candler Bldg.,
Atlanta, Ga. 30303

E. B. SHAW,
Of Counsel for Petitioner

CERTIFICATE OF COUNSEL

The foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Supreme Court of the United States.

This the _____ day of June, 1972.

G. SEALS AIKEN,
Attorney for Petitioner.

EDGAR B. SHAW,
Of Counsel for Petitioner.

CERTIFICATE OF SERVICE

This is to certify that I have this day served Defendant Ethel Grady Mylius with the foregoing petition for rehearing by sending a copy of the same by first-class mail to Messrs. James A. Mackay and Thomas W. Elliott, Suite 500, One West Court Square, Decatur, Ga. 30030, her counsel of record.

This the _____ day of June, 1972.

G. SEALS AIKEN,
Attorney for Earl L. Watts.